

# THE CORPORATION JOURNAL

(REGISTERED U. S. PAT. OFFICE)

VOL. XVI, No. 12

DECEMBER, 1944

PAGES 241-260

COMPLETE NUMBER 313

*Published by*

THE CORPORATION TRUST COMPANY AND ASSOCIATED COMPANIES

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## Another year--

Another year, another record. December, 1944, marks the completion of the 52nd year of the Corporation Trust system of statutory representation. In every year of the fifty-two, the number of lawyers using CT statutory representation for their clients has increased—and CT representation may be installed only upon au-

thority of each company's attorney.

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# Foreign Corporations

## Allocation of Net Income Taxes

Of the 32 jurisdictions in the United States which impose taxes upon the net income of foreign corporations, 20 states permit an allocation of the income of corporations doing business within and without the state to be made on the basis of a separate accounting of income derived from the state.<sup>1</sup>

Where, however, such separate accounting is not permitted, or where, if allowed, such a foreign corporation does not elect to report its income on the basis of such separate accounting, an allocation of a proportion of the total net income of the corporation is made to the state and the tax is based upon this. Generally, the statutes indicate the broad bases upon which allocation is to be made, by specifying the factors

which are to determine the apportionment, and the forms provide details with regard to the factors to be used.<sup>2</sup>

The most common factors employed in determining the proportion of the foreign corporation's allocable net income to be assigned to the taxing state are property, payroll and sales.<sup>3</sup> In a number of states, the proportion of net income taxable is determined by the relation between the sum of the property situated and the business transacted within the state and the total of such items everywhere.<sup>4</sup> In the remaining states, there is comparatively little uniformity in the factors used in the allocation of net income of a foreign corporation.

<sup>1</sup> Ordinarily, specific permission of the taxing authorities of the states allowing this method must first be obtained, as it may not be regarded by them as adaptable to the reporting of all types of companies.

<sup>2</sup> In several states, however, allocation factors do not appear in the statutes. There the method of allocation is indicated by the authorities in the form to be filed, or it is necessary to attach riders to the returns showing the basis on which the allocation has been made.

<sup>3</sup> These three factors are reflected in computations in California, Connecticut, Georgia, Idaho, Louisiana, Massachusetts, Minnesota, Montana, New York, Oregon, Pennsylvania and Utah and, with some variations, in Alabama, Arizona, Oklahoma and Wisconsin.

<sup>4</sup> These two factors are employed in Colorado, Kentucky, Maryland, North Carolina (merchandising corporations), North Dakota, South Carolina (merchandising corporations) and Virginia.

## Domestic Corporations

### Delaware.

Federal District Court refuses to assume declaratory judgment jurisdiction of stock appraisal controversy under Sec. 61 which was pending before state Chancery Court. Plaintiffs were owners of 1794 shares of preferred stock of York Ice Machinery Corporation which had been merged with defendant corporation. They had objected to the merger and had unsuccessfully endeavored to enjoin it in the Federal District Court, District of Delaware, in which they subsequently sought a declaratory judgment that appraisers' findings under Sec. 61, Delaware Corporation Law, were invalid. Nineteen days after their complaint was filed in the Federal court, defendant filed a petition in the Delaware Chancery Court, seeking an order from the Chancellor directing plaintiffs to turn over their stock upon payment of \$90 per share by defendant, an amount fixed by two of the three appraisers as the value of the stock. That petition was pending at the time the District Court rendered its opinion. The latter court granted defendant's motion to dismiss the complaint, observing that the Delaware courts had held "that if the dissenting stockholder demands payment for his stock then payment must be had under Sec. 61, the procedures prescribed by that statute must be followed, and the remedial right created by Sec. 61 may only be enforced in the manner prescribed." "Neither this court nor the Delaware Chancery Court has the power to compel the appraisers to modify their decision as to amount." "By the filing of its petition defendant has brought into the state court all matters in controversy between the parties where they can now be fully adjudicated. The questions raised are local in nature and to be governed by Delaware law. It would be 'gratuitous interference' for the Federal court to proceed to declaratory relief where there is an absence of state law on the scope of the rights granted under Sec. 61, especially where the Chancellor as the highest judicial officer of the State of Delaware has the parties and the issues before him, ready to terminate the whole controversy. Under the particular circumstances of the case at bar, this court would not exercise discretion to assume declaratory judgment jurisdiction even if it were of the opinion that such jurisdiction existed." *Root et al. v. York Corporation*, 56 F. Supp. 288. William H. Foulk of Wilmington and Hays, St. John, Abramson & Schulman of New York City, for plaintiffs. Aaron Finger and Robert H. Richards of Richards, Layton & Finger of Wilmington, for defendant. George D. Hornstein of New York City, amicus curiae.

Charter provision for transfer of sole voting powers to preferred stock and for reversion of those powers to the common stock, each upon stipulated contingencies construed. In *Ellingwood v. Wolf's Head Oil Refining Company, Inc., et al.*, 33 A. 2d 409, (The Corporation Journal, November, 1943, page 31), the Court of Chancery, New Castle County, had occasion to construe a charter provision under which the sole right to vote for the election of directors and for all

other purposes was to be transferred from the common to the preferred stock upon a two-year default in preferred stock dividends. Such a transfer of voting rights took place in 1936, due to the fact that the corporation was in default in the declaration and payment of preferred dividends in the amount of more than two years' dividends at that time. The charter also contained provision that the right to vote for the election of directors and for all other purposes was to revert to the holders of the common stock when "the corporation shall have declared and paid for a period of a full year a 6% dividend on the preferred stock." At a disputed election at the annual meeting in May, 1943, both common and preferred stockholders attempted to elect directors. The petitioner, a holder of common stock, sought to determine which slate had been validly elected. At the time of the election, the corporation was in default in respect to the declaration and payment of dividends in the amount of two years' dividends on the preferred stock, the arrearages, amounting to 37½%, or more than six years' dividends, having accrued prior to 1942. During 1942 the corporation declared and paid a full 6% dividend on the preferred stock. In applying the charter provisions, the Court of Chancery had ruled in favor of the preferred stock, concluding that, under the charter provision, "the preferred holders are authorized to elect to exercise voting power at any time when preferred dividends are in default in the amount of two years' dividends, regardless of when they may have accrued." The Supreme Court of Delaware affirmed the decree of the Chancellor, emphasizing that "if the corporation is still in default in the declaration and payment of dividends in the amount of two years' dividends on the preferred stock, when a six percent dividend is paid on preferred stock for the period of a full year, said preferred stockholders can still avail themselves of the right to vote for the election of directors and for all other purposes, if they comply with the conditions of the charter by giving notice to the corporation of their decision to exercise such right to vote." *Ellingwood v. Wolf's Head Oil Refining Co., Inc., et al.*, 38 A. 2d 743. William S. Potter of Southerland, Berl & Potter of Wilmington, and John T. Carpenter of Carpenter & Stevenson of New York City, for appellants. William G. Buchanan and Milton W. Lamproplos of Smith, Buchanan & Ingersoll of Pittsburgh, Pa., and Harold T. Parker of Oil City, Pa., for corporation and for appellants Eugene W. Chase, Arthur W. Scott, Frederick Fair, Edward R. Gnade, Bayard H. Waterbury and Everett E. Bellen. David F. Anderson of Southerland, Berl & Potter of Wilmington, for appellees John T. Carpenter, J. Roland Stevenson, Paul M. Grimm and George M. McIntosh.

#### New York.

Action of directors in amending by-law adopted by stockholders relating to the removal of officers, with certain exceptions, by eliminating the exceptions, held invalid. A by-law adopted by the stockholders in 1941 provided that "the Board of Directors may

remove at their pleasure any officer with the exception of the Chairman of the Board or the President." At a meeting of the board of directors held on July 28, 1944, this by-law was amended to provide that all officers, without any exceptions, were to serve during the pleasure of the board and were to be subject to removal by the directors, with or without cause. Subsequently, the board adopted resolutions removing petitioner as Chairman of the Board and electing respondent to fill petitioner's "unexpired term." Petitioner sought to set aside the respondent's election as illegal, null and void. The petition was granted to that extent by the Supreme Court, Special Term, New York County. The court noted that the by-laws provided that they were subject to amendment, repeal or alteration, in whole or in part, "by a majority vote of the Board of Directors or by a majority vote of the entire outstanding stock." Referring to sections 14(5) and 27 of the General Corporation Law, the court remarked: "That by-laws adopted by directors should be subordinate to those adopted by stockholders is clearly the legislative intent." "In the absence of language clearly and unequivocally indicating that the stockholders intended the power to amend by-laws conferred upon the directors to extend to by-laws adopted by the stockholders which limit the powers of the directors, it would seem that the directors possessed no such power. The court accordingly holds that the directors' by-laws authorizing the removal of the Chairman of the Board without cause were invalid and void." The court also considered the validity of the original stockholders' by-law in so far as it purported to prohibit the directors from removing the Chairman of the Board without cause. It concluded that it was to be regarded as a "harmless and slight infringement upon the provisions of section 27 of the General Corporation Law and section 60 of the Stock Corporation Law." *Petition of Buckley*, 50 N. Y. S. 2d 54. David V. Cahill of New York City, for petitioner. Davies, Auerbach, Cornell & Hardy (Julien T. Davies and John W. Burke, Jr., of counsel), of New York City, for respondent.

**1944 Amendment of Sec. 61 held retroactive and applicable to pending actions.** Ch. 667, L. 1944, added the following sentence to Sec. 61, General Corporation Law: "In any action brought by a shareholder in the right of a foreign or domestic corporation it must be made to appear that the plaintiff was a stockholder at the time of the transaction of which he complains or that his stock thereafter devolved upon him by operation of law." In a derivative suit begun early in 1942, involving two stockholders who acquired their stock, one in December, 1936, and the other in June, 1942, the New York Supreme Court, Special Term, New York County, had occasion to consider whether, by reason of the 1944 law mentioned, plaintiffs were in a position to maintain the action subsequent to its passage and, if so, to what extent. The court remarked: "The clear language of Section 61, as amended, makes it an imperative requirement that it affirmatively appear that each plaintiff was a shareholder of the corporation at the time of the transaction of which complaint is

made and it is manifest that the failure to affirmatively show this fact is a fatal defect and bars the maintenance of the action." After discussing the history of the legislation and noting that it was patterned after rule 23(b) of the Federal Rules of Civil Procedure, the court came to the following conclusions: "(1) That Section 61 of the General Corporation Law, as amended, is procedural and retro-active and applies to pending actions; (2) that the absence of an affirmative allegation that plaintiff was a stockholder at the time of the transaction complained of, or that his stock thereafter devolved upon him by operation of law, is a fatal defect; (3) that in the case at bar, leave to serve a third amended complaint as to the third and fifth causes of action should be granted to plaintiffs who may be able to remedy the defect; (4) that as to plaintiff Coane the transactions complained of must not antedate December 24, 1936, it being shown that that is the earliest date when he could have become a stockholder of American Distilling Company, and as to plaintiff Koster, the transactions complained of must not antedate June 1942, it being shown that that is the date when said plaintiff became a stockholder of the said corporation." *Coane et al. v. American Distilling Co. et al.*, 49 N. Y. S. 2d 838. Hays, Podell & Shulman (Mortimer Feuer and Abraham Porter, of counsel), of New York City, for plaintiffs. Reed, Truslow, Crane & DeGive (William G. Mulligan, Stewart M. Seymour, Martin J. Coughlin and Milton Kaplan, of counsel), of New York City, for defendants.

#### Ohio.

Supreme Court of Nebraska rules that Ohio company which amended its charter prior to a 25-year expiration date by deleting the language limiting its existence, acquired unlimited or perpetual existence under the Ohio law. In a recent case before the Supreme Court of Nebraska involving a foreclosure proceeding instituted by an Ohio company, an amendment of the answer of one of the defendants was to the effect that plaintiff corporation had been chartered for 25 years only, and that its charter had expired in 1939. Pertinent Ohio statutes and copies of plaintiff's charter and amendments were introduced in evidence. The original articles of incorporation fixed its life at 25 years, which would end on May 28, 1939. Eight days prior to the expiration date, the paragraph containing this limitation was amended in toto by written consent of all the stockholders, entirely omitting the time of termination of the life of the corporation. The court noted that Sec. 8623-7, Ohio General Corporation Act, which became effective many years prior to the charter amendment, repealing the 25-year limitation, provided for the "perpetual succession" of Ohio corporations. The court quoted from 18 C. J. S., Corporations, p. 469, Sec. 78, as follows: "If the period of its existence is not limited by its charter a corporation will exist indefinitely and until it is legally dissolved." "In our opinion," concluded the court in this connection, "the plaintiff Ohio corporation was a valid, existing corporation, and there appears no ground

whatever for the claim that there was anything irregular or wrong in so amending the articles of incorporation of this company, and it had the legal right to foreclose its mortgage in the State of Nebraska." *Pontiac Improvement Co. v. Leisy et al.*, 14 N. W. 2d 384.

Board of directors which left entire conduct of business to elected officers held estopped to deny authority of treasurer to execute promissory note. Plaintiff, president of defendant company, sued on a promissory note given to his order for \$973.04, signed by the Treasurer of the company. The note had authorized any attorney at law to appear in court after the obligation became due and waive the issuing and service of process and confess a judgment and this had been done and judgment entered against the company. Two years later appellant, claiming to be the majority shareholder, director and a vice-president of the corporation, was made a party defendant with leave to plead, whereupon she filed a motion to vacate and set aside the judgment. This motion was denied by the trial court and subsequently the Court of Appeals affirmed the judgment of the trial court. This judgment was affirmed by the Supreme Court of Ohio, which found appellant estopped to deny the authority of the treasurer to execute the note. Appellant had been a member of the board of directors at the time the note was executed. The trial court concluded that the board of directors was guilty of a failure to function, inasmuch as it had left the entire conduct of the business to the elected officers. "We accept that finding," said the Supreme Court of Ohio. "The board of directors by its failure to function and its acquiescence in the conduct of the president and secretary and treasurer, in the doing of any and all acts necessary to the conduct of the business is now estopped to deny the authority of the treasurer to execute the note upon which this judgment is based." *Kimball v. Kimball Bros., Inc., et al.*, 56 N. E. 2d 60. Binns & Tresemer of Columbus, for appellant. Waymon B. McLeskey of Columbus, for appellee.

## Foreign Corporations

### New York.

Service upon foreign railroad corporation, carrying on varied activities in New York, upheld. Defendant Wisconsin railroad corporation, not licensed in New York, moved to set aside service of summons and complaint made upon the company's assistant secretary and assistant treasurer, who was a director and a resident of New York. None of the company's railroad operations were carried on in New York. However, in this state it had an office where its stock was transferable and certain of its debentures were payable. These activities were under the supervision of the person upon whom service was made, a partnership of which he was a member supplying the office space and clerical force and being compensated for that work. A bank account was maintained in New York in connection with such activities. In addition, there was another

partner of the firm who was secretary and treasurer and a director of the company, although residing in New Jersey. Directors' meetings were usually held in New York in the partnership office. The name of the company was not displayed there. The corporation for a period of years had maintained a traffic office in New York City in charge of an agent soliciting freight business for trans-shipment over the lines of the company in Wisconsin. There the company's name was listed in the building directory and in the telephone book. The Supreme Court, Special Term, Kings County, in upholding the service, remarked: "If each of the foregoing facts were to be considered separately, as a sole basis upon which to predicate a conclusion, then the objection of the company would be valid. In other words, the conduct of this freight agency in New York would not, in and of itself, constitute doing business in New York State; the fact that the obligations of the Company were payable here would not, taken alone, constitute doing business in New York State; the same is true of the fact that the corporation stock was transferable and its dividends were paid at the office of Robert Winthrop & Co.; also the presence of an officer and the occasional meetings of directors in this state would not be doing business here. But, when all these activities are taken together, in addition to the fact that the directors usually meet in New York, that the Company maintains a bank account here which admittedly contains funds other than those required to meet prospective payments of distributions on the securities, the court is constrained to the conclusion that the said foreign corporation is present in New York and is, therefore, subject to the process of our courts." *Sperling v. McGee et al.*, 49 N. Y. S. 2d 477. Cadwalader, Wickersham & Taft of New York City, for defendant Green Bay & Western R. Co., for the motion. Geist & Netter of New York City, for plaintiff, in opposition.

**Refusal of court to take jurisdiction in suit involving merger of two Delaware corporations upheld by the Court of Appeals.** In *Langfelder et al. v. Universal Laboratories, Inc.*, 45 N. Y. S. 2d 19, (The Corporation Journal, March, 1944, page 127), the Supreme Court, Special Term, New York County, refused to take jurisdiction in a suit involving the validity and effect of a merger of two Delaware companies, regarding the plaintiffs as having a complete remedy in the courts of Delaware. Upon appeal to the Court of Appeals, after the entry of an order of the Appellate Division, First Department, unanimously affirming the judgment of the Special Term, the highest State court has ruled that the discretion exercised by the lower courts in declining jurisdiction was not abused and has affirmed the judgment. The court, noting that under two of the causes of action a money judgment was sought, pointed out that a representative action had been brought in the Chancery Court of Delaware in behalf of *all* holders of the preferred stock of the constituent company whose stock plaintiffs held, and that that action, were plaintiffs therein successful, "would seem to afford plaintiffs the basic relief which they now seek." It was also observed that

# Not only for Directors' Service Stockholders

For both those reasons the corporation's securities should be handled by experienced hands. A transfer agent is responsible for the transfer of a stockholder's shares not only to the new owner but also to the responsibility of the original owner. As a result, the original owner is not responsible for the dollars in some cases. On the other hand, delays, or bothers, or excessive wearisome formalities can be avoided by stockholders desiring to transfer their shares. The steadily increasing number of transfers to get the transfer quickly and safely is the reason for our own offices and into the hands of experienced transfer agents.

Equipment as up to date as this morning's day-break — for keeping stockholders' lists, for addressing meeting notices, for writing dividend checks, for preventing errors and omissions; personnel trained to trigger expertness in every transfer detail; complete service as transfer agent or registrar at the New York office (in the heart of the financial district), or in Jersey City (ten minutes from Wall Street), or in Wilmington, Delaware (especially economical for Delaware corporations)—these are but examples of The Corporation Trust Company's resources for acting as your company's transfer agent or registrar.

# Officers' and Safety but for convenience—

as the transfer of a cor-  
poration should be in trained,  
the transfer of a stock-  
holder authorized is a direct  
transfer of shares and directors to  
the corporation. This cost thousands of  
dollars. On the other hand,  
the necessary exactions of  
the corporation cause ill-feeling to  
the stockholders. . . . Therefore the  
transfer among corporations  
of securities out of their  
present hands of a sound,  
transfer.

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Cleveland 14.....	925 Euclid Avenue
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Detroit 26.....	719 Griswold Street
Dover, Del.....	30 Dover Green
Hartford 3.....	50 State Street
Jersey City 2.....	15 Exchange Place
Los Angeles 13.....	510 S. Spring Street
Minneapolis 1.....	409 Second Avenue S.
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Philadelphia 9.....	123 S. Broad Street
Pittsburgh 22.....	535 Smithfield Street
Portland, Me. 3.....	57 Exchange Street
San Francisco 4.....	220 Montgomery St.
Seattle 4.....	1004 Second Avenue
St. Louis 2.....	314 North Broadway
Washington 4.....	1329 E. St. N. W.
Wilmington 99.....	100 West 10th Street

"entertainment of jurisdiction by our courts would necessarily involve regulation and management of the internal affairs of a corporation dependent upon the laws of the foreign state." *Langfelder et al. v. Universal Laboratories, Inc.*, 293 N. Y. 200, 56 N. E. 2d 550. Charles Rosenbaum and Maurice Gellar of New York City, for appellants. Orison S. Marden, for respondent.

### Pennsylvania.

Service of process upheld where made upon steamship company owning vessels which entered port in state only as vessels chartered to others. In *Van Horn v. Waterman Steamship Corporation*, 54 F. Supp. 376, (The Corporation Journal, April, 1944, page 149), the United States District Court, Eastern District of Pennsylvania, vacated service of process made upon the assistant manager of a Philadelphia office maintained by defendant New York corporation upon evidence showing that the activities of defendant's vessels with respect to the port of Philadelphia were limited to their presence there in 1940 and 1941 when chartered to other companies, and that after 1941 all vessels belonging to defendant were requisitioned by and chartered to the United States War Shipping Administration. The court concluded that the company was not doing business either before or after the requisitioning of the ships by the Government. Upon a motion to dismiss the complaint, after reargument, the District Court reversed its former decision and denied the motion to dismiss. It concluded that it had erred in ruling that when the ships of defendant put in at Philadelphia to load and unload in 1940 and 1941, the transportation business accomplished by them was solely the business of the chartering company and observed that there could have been and undoubtedly was a division of business between the two companies. The same considerations were regarded as applying after 1941, when the vessels belonging to the defendant were requisitioned by the War Shipping Administration. The court felt that "the defendant was still in the business of transportation although under contract with the government, and that part of that business was conducted at the port of Philadelphia." *Van Horn v. Waterman Steamship Corporation*,\* United States District Court, Eastern District of Pennsylvania, August 28, 1944. Freedman & Goldstein of Philadelphia, for plaintiff. Rambo, Rambo & Knox of Philadelphia, for defendant. Commerce Clearing House Court Decisions Requisition No. 327476.

\* The full text of this opinion is printed in *The Corporation Tax Service*, Pennsylvania, page 348.

## Taxation

### Colorado.

Colorado company, engaged in both intrastate and interstate business, ruled taxable on apportioned income attributable to business transacted wholly within Colorado only. Plaintiff Colorado

corporation, having income derived from both intrastate and interstate business, allocated by statutory formula for income tax purposes in its 1941 and 1942 returns, only the portion thereof attributable to business transacted wholly within Colorado. The Tax Commission, after examining the returns, made additional assessments for each of these years, including for taxation purposes the net income from that portion of business said by the plaintiff to be interstate commerce. These additional assessments were held to be erroneous by the District Court of the City and County of Denver. Other than as outlined above, details are not given with regard to plaintiff's transactions within and without the state. The court based its ruling primarily upon the decision of the Supreme Court of Oklahoma in *Rock Island Refining Co. v. Oklahoma Tax Commission*, 145 P. 2d 194, (appeal dismissed, *per curiam*, 64 S. Ct. 1159, 1285), (The Corporation Journal, May, 1944, page 173). In that case, however, the state court ruled that an Oklahoma company was subject to the state income tax upon its entire net income, including income from sales followed by shipments from a point within the state to points outside the state and the holding permitted a larger measure of taxation than in the case before the Denver court. *The Stayput Clamp & Coupling Co. v. Cruse*,\* District Court of the City and County of Denver, June 20, 1944. Commerce Clearing House Court Decisions Requisition No. 325316.

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\* The full text of this opinion is printed in *The Corporation Tax Service*, Colorado, page 1508.

### Missouri.

**Five-year civil action statute of limitations held to apply to delinquent income taxes.** In actions instituted in 1943, the State of Missouri sought to recover from defendant personal income taxes for the years 1931, 1932 and 1934. The question presented to the Missouri Supreme Court on appeal was whether the claims were barred by the statute of limitations. The court noted that there was no limitation to be found in the income tax statute similar to the limitation of five years for suits to recover personal property taxes and delinquent real property taxes. It held that the five-year statute of limitations, applicable to civil actions other than those for the recovery of real property, applied in connection with the income tax, since that provision was made applicable "to actions brought in the name of this state, or for its benefit, in the same manner as to actions by private parties." *State of Missouri v. Dalton*, Missouri Supreme Court, Division Two, September 5, 1944. Commerce Clearing House Court Decisions Requisition No. 327238.

### New Jersey.

**Company, with three plants in county, ruled not necessarily assessable on certain intangibles at one plant merely because it was**

not assessed upon them elsewhere, in absence of evidence that those intangibles had a situs at that particular plant. In a case before the New Jersey Court of Errors and Appeals involving an assessment for taxes upon real and personal property of a New Jersey corporation situate in the City of Garfield, the company maintained plants in three other municipalities in Bergen County. In its opinion, the court said: "It is argued that the Supreme Court did not consider, in determining the value of personal property, certain intangibles. There is no proof that the intangibles had a situs in the City of Garfield. Because some part of them was not assessed elsewhere is no reason they should be assessed in the City of Garfield in the absence of evidence that they had a situs there." *City of Garfield v. State Board of Tax Appeals et al.*,\* 39 A. 2d 105. Frank P. McCarthy of Jersey City, for prosecutor-appellant. A. Harry Moore, of Jersey City, for Forstmann Woolen Co. Commerce Clearing House Court Decisions Requisition No. 327680.

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\* The full text of this opinion is printed in *The Corporation Tax Service*, New Jersey, page 2318.

#### Ontario.

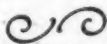
Mandamus granted for transfer in Ontario of shares of New York company, owned by Ontario decedent without necessity of tender by Ontario executor of United States federal tax waiver. An owner of shares of a New York company died while domiciled in the Province of Ontario. The certificate stated on its face that it was transferable either in the City of New York or in Toronto, Canada, and that a named trust company in Toronto was registrar of the corporation. The executor forwarded the certificate, with the letters probate of the will, and Dominion succession duty consents to the Toronto transfer agent, in order to have the shares transferred. This the agent refused to do unless supplied with a United States of America federal waiver of tax as evidence that no United States federal tax was payable in respect to the transmission of the shares. The executor moved for an order by way of mandamus to compel the transfer agent to effect the transfer. The Ontario High Court granted the motion, following the rule laid down under somewhat similar circumstances in *Re Russell*, (1942) 3 D. L. R. 668, O. R. 466, where an application for an order in lieu of mandamus was granted. *Re Hatch*, (1944) 3 D. L. R. 477. J. W. Pickup, K. C., for applicant, executor of the will of Lawrence B. Hatch. C. H. A. Armstrong, K. C., for National Trust Co. and Fanny Farmer Candy Shops, Inc.

#### Pennsylvania.

Remuneration paid field superintendents by construction company held assignable to Pennsylvania for income tax purposes in numerator of wages and salaries fraction where they were hired by and reported to a Pennsylvania office; receipts from construction contracts held not allocable as fees or commissions in gross receipts

**fraction.** Defendant Delaware corporation appealed from the settlement of its income tax for 1937, the wages and salaries fraction and the gross receipts fraction in allocation being in dispute. The principle office of defendant was in Pittsburgh but it maintained other offices in New York City, Washington, D. C., and Birmingham, Ala. It was engaged in extensive construction business involving projects in twenty-eight states and two foreign countries. The work was done under contracts either calling for a lump sum payment, or for cost plus an agreed amount. As to the assignment of wages and salaries to Pennsylvania, the statute provides that these "shall be such expenditures for the taxable year as represent the wages, salaries, commissions, or other compensation of employees, not chiefly situate at, connected with, or sent out from, premises for the transaction of business maintained by the corporation outside the Commonwealth." Field superintendents, paid either on a salary or hourly basis, were hired by and reported to the Pittsburgh office. The defendant allocated these payments to the field offices, but the Court of Common Pleas, Dauphin County, held that they should have been allocated to Pennsylvania, regarding these men as chiefly connected with or sent out from the Pittsburgh office, remarking that if the superintendents had been sent out from any of the other three offices, their wages and salaries would not be assigned to Pennsylvania. In considering the gross receipts fraction, the court ruled that the amount of receipts from construction contracts could not be classified as "sales" which the act required to be included in allocable gross receipts. Another holding was that no part of the receipts from lump sum contracts could be considered as "fees" or "commissions" which were to be included as allocable "gross receipts" under the act. As to the cost plus contracts, the court found that the Commonwealth had failed to produce evidence that those receipts were taxable. The burden of proof being upon it to do so, the court concluded that the burden was not met by the Commonwealth. The court inclined to the view, on the record, that the receipts from these contracts were also not "fees" or "commissions" such as were allocable. *Commonwealth of Pennsylvania v. Rust Engineering Company*,\* Court of Common Pleas, Dauphin County, September 18, 1944. James Duss, Attorney General, for appellant. Hull, Leiby & Metzger of Harrisburg, for appellee. Commerce Clearing House Court Decisions Requisition No. 327630.

\* The full text of this opinion is printed in *The Corporation Tax Service*, Pennsylvania, page 1315.



## Appealed to The Supreme Court

The following cases previously digested in The Corporation Journal have been appealed to The Supreme Court of the United States.\*

CONNECTICUT. Docket No. 62. *Spector Motor Service, Inc. v. Walsh*, 139 F. 2d 809. (The Corporation Journal, March, 1944, page 128.) Connecticut Corporation Business Tax Act—application to interstate motor carrier. Petition filed, April 18, 1944. Certiorari granted, May 22, 1944. Argued, November 9, 1944.

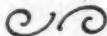
GEORGIA. Docket No. 23. *Davis et al. v. Smith et al.*, 28 S. E. 2d 148. (The Corporation Journal, April, 1944, page 153.) Property taxes—taxability of open account owed by United States for construction work. Petition for certiorari filed, February 8, 1944. Certiorari granted, April 3, 1944. Argued October 16, 1944.

INDIANA. Docket No. 40. *Hewit v. Freeman*, 51 N. E. 2d 6. (The Corporation Journal, November, 1944, page 233.) Indiana Gross Income Tax Act—application to proceeds from sales of corporate stocks and bonds by resident owner to nonresidents through brokers. Appeal filed, March 13, 1944. Jurisdiction noted, April 3, 1944. Argued, November 8, 1944.

INDIANA. Docket No. 75. *Ford Motor Co. v. Department of Treasury et al.*, 141 F. 2d 24. (The Corporation Journal, November, 1944, page 233.) Indiana Gross Income Tax Act—income from sales made on orders accepted, goods manufactured, and deliveries made to dealers, outside of Indiana. Petition for certiorari filed, May 3, 1944. Certiorari granted, May 29, 1944.

OHIO. Docket No. 38. *The Hooven & Allison Company v. Evatt*, 51 N. E. 2d 723. (The Corporation Journal, February, 1944, page 111.) Ohio general property tax levied against goods grown in foreign country and transshipped by seller's agent from port of entry to buyer in Ohio. Petition for certiorari filed, March 11, 1944. Certiorari granted, April 10, 1944. Argued, November 7 and 8, 1944.

\* Data compiled from CCH U. S. Supreme Court Service, 1944-1945.



## Regulations and Rulings

**CANADA**—The statement of the Minister of Finance noted on page 195 of The Corporation Journal for June, 1944, to the effect that any contributions to charitable organizations, made after January 31, 1944, by business concerns, will be allowed as a deduction for income and excess profits tax purposes only to the extent of 40% of such contributions, has since been expressed in legislation to the effect that the amount of such donations made in excess of the greater of (a) the average of the taxpayer's donations in the last two fiscal periods ending before July 1, 1942, or (b) of payments made before February 1, 1944, or paid pursuant to an agreement or undertaking evidenced before such day either by an instrument in writing or by a payment that is one of a series of payments, is to be allowed as a deduction for income and excess profits tax act purposes only to the extent that the total taxes payable by the taxpayer under these acts are thereby diminished by 40% of such excess. (CCH Canadian Tax Service, ¶ 10-632a.)

**NEW MEXICO**—A foreign pipe line company engaged exclusively in interstate commerce is not subject to the franchise tax. (Opinion of Attorney General to State Corporation Commission, New Mexico CT, ¶ 101.14.)

**NEW YORK**—A domestic corporation which winds up its business prior to March 31, 1944, but which does not file its certificate of dissolution until after such date, is not subject to the tax imposed by Sec. 209(3), Tax Law. However, any tax liability which accrued prior to March 31, 1944, is preserved. Since the tax is not based on the termination of the privilege of a corporation's exercising its franchise, it appears clear that the statute is intended to fix the tax at the time when the corporation ceases to do business rather than at the time when it files its certificate of dissolution. (Opinion of Attorney General, New York CT, ¶ 10-109.)

If an employer, for his own convenience, fails to deduct and withhold the personal income tax currently, but elects to withhold the tax for an entire year from compensation paid either at the close of the taxable year, or prior to the 15th of February in the following year when withholding returns are due, the employer assumes liability for the tax, and if by reason of his failure to withhold, the employer is unable to collect the tax from the employee, such tax will be required to be paid by the employer. (Ruling of Director, Income Tax Bureau, New York CT, ¶ 200-730.)

**TEXAS**—Transfers of subscription warrants issued by a corporation to those entitled to subscribe for stock, evidencing their rights to subscribe for stock, are not taxable under the Stock Transfer Tax requirements. (Opinion, Attorney General, Texas CT, ¶ 60-201.18.)

The measure of the amount to be paid as a tax to the State of Texas upon the occupation of producing oil, under Art. 7057a, should include the amount paid as a premium for the production of oil from so-called "stripper wells." (Opinion, Attorney General to Comptroller of Public Accounts, Texas CT, ¶ 45-927.)

## Some Important Matters for December and January

This Calendar does not purport to be a *complete* calendar of all matters requiring attention by corporations in any given state. It is a condensed calendar of the more important requirements covered by the *State Report and Tax Bulletins* of The Corporation Trust Company. Attorneys interested in being furnished with timely and complete information regarding *all* state requirements in any one or more states, including information regarding forms, practices and rulings, may obtain details from any office of The Corporation Trust Company or C T Corporation System.

**ALABAMA**—Annual Application Fee for permit to do business due on or before February 1.—Domestic and Foreign Corporations.

Report of Resident Stockholders and Bondholders due on or before February 1.—Domestic and Foreign Corporations.

**ALASKA**—Annual Corporation Tax due on or before January 1.—Domestic and Foreign Corporations.

**CALIFORNIA**—Quarterly Retail Sales Tax Return and Payment due on or before January 15.—Domestic and Foreign Corporations.

**DELAWARE**—Annual Report due on or before first Tuesday in January.—Domestic Corporations.

**DISTRICT OF COLUMBIA**—Annual Report published and filed between January 1 and January 20.—Domestic Corporations.

Application for license in connection with District Income Tax due before January 1.—Domestic and Foreign Corporations.

**GEORGIA**—Annual License Tax Report due on or before January 1.—Domestic and Foreign Corporations.

**INDIANA**—Annual Gross Income Tax Return and Payment due on or before January 31.—Domestic and Foreign Corporations.

**IOWA**—Quarterly Retail Sales Tax Return and Payment due on or before January 20.—Domestic and Foreign Corporations.

**KENTUCKY**—Return of Withholding at the Source due on or before January 31.—Domestic and Foreign Corporations.

**LOUISIANA**—Annual Report due February 1.—Domestic Corporations.

**OHIO**—Report to Department of Industrial Relations due on or before February 1.—Domestic and Foreign Corporations.

Retail Sales Tax Reports due on or before January 31.—Domestic and Foreign Corporations.

**PENNSYLVANIA**—Report of Unclaimed Dividends, Credits, etc., due in January.—Domestic Corporations.

**SOUTH CAROLINA**—Statement due January 31.—Foreign Corporations.

**SOUTH DAKOTA**—Quarterly Retail Sales Tax Return and Payment due on or before January 15.—Domestic and Foreign Corporations.

**UNITED STATES**—Fourth Instalment of Income Tax due on or before December 15.—Domestic Corporations and Foreign Corporations having an office or place of business in the United States.

**VERMONT**—List of Stockholders due on or before January 31.—Domestic and Foreign Corporations.

**WEST VIRGINIA**—Annual Gross Sales Tax Return and Payment due on or before January 30.—Domestic and Foreign Corporations.

# The Corporation Trust Company's

## Supplementary Literature

*In connection with its various activities The Corporation Trust Company publishes the following supplemental pamphlets, any of which will be sent without charge to readers of The Journal. Address The Corporation Trust Company, 120 Broadway, New York, 5, N. Y.*

**What Constitutes Doing Business.** (Revised to October 1, 1943.) A 181-page book containing brief digests of decisions selected from those in the various states as indicating what is construed in each state as "doing business."

**Cross Hauling . . . and the Answer, Spot Stocks.** Explains how the possible wartime restrictions on cross-hauling point the way to volunteer peacetime economies through the keeping of warehouse stocks at strategic shipping points.

**Amendments to Delaware Corporation Law, 1943.** Contains complete text of the amendments adopted at the 1943 session of the legislature, giving for each one a brief explanation of its purpose and effect.

**Contracts You Can't Enforce.** Interesting case-histories which show advisability of contractor getting lawyer's advice before undertaking construction work outside his home state, even for federal government.

**After the Agent for Service Is Gone.** What will happen *then* if suit is brought against the company? Some examples taken from actual court cases, with full texts of the final decisions.

**Delaware Corporations.** Presents in convenient form a digest of the Delaware corporation law, its advantages for business corporations, the attractive provisions for non par value stock, and a brief summary of the statutory requirements, procedure and costs of incorporation.

**Spot Stocks—and Interstate Commerce.** Treats, in a general and informal way, of the relation between the carrying of goods in warehouses in outside states and the statutory obligations which that activity, in some states, places on the corporation owning the goods.

**When a Corporation Leaves Home.** A simple explanation of the reasons for and purposes of the foreign corporation laws of the various states, and illustrations of when and how a corporation makes itself amenable to them. Of interest both to attorneys and to corporation officials.

**We've Always Got Along This Way.** A 24-page pamphlet of cases in various states in which corporation officials who had thought they were getting along very well with statutory representation by a business employee suddenly found themselves in trouble.

**What! We Need a Transfer Agent? Nonsense!** The foregoing is the title of a pamphlet which describes in detail, with many illustrations, the exact steps through which a stock certificate goes in being transferred from one owner to another by an experienced transfer agent.

**Judgment by Default.** Gives the gist of *Rarden v. Baker* and similar cases, showing how corporations qualified as foreign in any state and utilizing their business employees as statutory representatives are sometimes left defenseless in personal damage and other suits.

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## THE CORPORATION JOURNAL

The Corporation Journal is published by The Corporation Trust Company monthly, except in July, August, and September. Its purpose is to provide, in systematic and convenient form, brief digests of significant current decisions of the courts, and the more important regulations, rulings or opinions of official bodies, which have a bearing on the organization, maintenance, conduct, regulation, or taxation of business corporations. It will be mailed regularly, postpaid and without charge, to lawyers, accountants, corporation officials, and others interested in corporation matters, upon written request to any of the company's offices.

When it is desired to preserve The Journal in a permanent file, a special and very convenient form of binder will be furnished at cost (\$1.50).

*[While no more binders are at present available, their production will be resumed as soon after the war as possible.]*

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